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SUPREME COURT, U. S.

No. 961

In the

Supreme Court of the United States

October Term, 1957

North Western-Hanna Fuel Co., Berwind Fuel Company, Carnegie Dock and Fuel Company, Inland Coal & Dock Company, Division of The North American Coal & Dock Company,
Appellants,

vs.

United States of America, Interstate Commerce Commission, and Railroad and Warehouse Commission of the State of Minnesota,
Appellees,

and

Canadian National Railway Company, et al,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

BRIEF FOR APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM

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Appellees.

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FOR THE DISTRICT OF MINNESOTA

BRIEF FOR APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM

PRELIMINARY STATEMENT

Two motions to affirm the judgment of the District Court have been filed herein by the appellees—one on behalf of the United States of America and the Interstate Commerce Commission (hereafter referred to as the government appellees) and the other on behalf of all the railroads serving the State of Minnesota (hereafter referred to as the railroad appellees). The upper lake commercial coal dock companies, appellants herein, respectfully contend that the District Court erred in affirming the Order of the Interstate Commerce Commission which authorized an increase in the Minnesota intrastate freight rates and charges on bituminous coal and that the questions presented by this appeal are of great public importance and so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

ARGUMENT

1. Inadequacy of Commission's Revenue Findings.

Both the government appellees and the railroad appellees contend that the findings in the instant case conform with the standards enunciated by this Court in *King v. United States*, 344 U.S. 254 (1952), for findings of the Interstate Commerce Commission in Section 13(4) proceedings and that the recent case of *Chicago, M., St. P. & P. R. Co. v. Illinois*, 355 U.S. 300 (1958), referred to hereinafter as the *Milwaukee case*, is not applicable. However, both appellees fail to point out the facts which distinguish the *King case* from the instant case and fail to recognize the facts which

demonstrate the applicability of the recent *Milwaukee case*.

In the *King case* this Court confined its discussion to the action of the Florida Commission denying the final 5% increase on all intrastate freight rates, which 5% increase the Interstate Commerce Commission had authorized on interstate freight rates. *King v. United States*, 344 U.S. 254, 73 S.Ct. 259, 262 (ft. 6) (1952). In the instant case the Minnesota intrastate freight rates for only eight separate commodities were involved before the Interstate Commerce Commission; and on this appeal the Minnesota intrastate freight rates on only bituminous coal are involved. Thus, it is obvious that the *King case*, on the facts, is distinguishable from the instant case.

Furthermore, in the *King case* this Court stressed the point that there was a finding of the Interstate Commerce Commission that all of the Florida intrastate rates and charges were abnormally low and were not contributing their fair share to the revenues required by the railroads to render adequate and efficient service. In the instant case, there was no similar finding as to the entire Minnesota operation. Furthermore, it was this exact point which this Court noted in the *Milwaukee case* and thereby distinguished the *Milwaukee case* from the *King case*. In referring to the lack of revenue findings in the *Milwaukee case*, this Court stated as follows:

> "It should be noted that in *King v. United States, supra,* the Court adverted to those very factors among the ICC's findings whose absence in the present case we find to be a fatal defect. The Court there emphasized the ICC finding that the entire intrastate traffic, freight and passenger, constituted a revenue drain upon the carrier's revenues from interstate traffic. Since the Commission has not in this case found whether or not the commuter rates, viewed in the light of the intrastate operation as a whole, constitute an undue revenue discrimination against the Milwaukee Road's interstate

operations, the judgment of the District Court in remanding the case to the Commission for further consideration must be affirmed."

In the *King case* this Court found that the Interstate Commerce Commission did not rely merely upon a disparity between the interstate and intrastate rates and that, therefore, the revenue findings referred to in the case of *State of North Carolina v. United States*, 325 U.S. 507, 65 U.S. 1260, 1265 (1945), were not required. However, in the instant case, the finding of the Interstate Commerce Commission, that the intrastate freight rates and charges on bituminous coal are abnormally low, is based solely upon a mere disparity between interstate and intrastate rates on this commodity since the railroad appellees failed to introduce any evidence on this issue except certain interstate and Minnesota intrastate freight rates on bituminous coal. (Jurisdictional Statement, pp. 26-27.)

The above discussion shows that the instant case is distinguishable from the *King case* in many important features. And, certainly, in view of the recent *Milwaukee case, supra*, the appellees have lost whatever comfort they might have previously hoped for from the *King case*.

The *Milwaukee case* involved an order of the Interstate Commerce Commission increasing intrastate passenger fares for the Milwaukee Road's Chicago suburban commuter service. Prior to the issuance of the Interstate Commerce Commission's order, the State Commission had denied the petition of the Milwaukee Road to increase such fares. Thus, the *Milwaukee case* presented the "problem of adjusting State and federal interests in the regulation of intrastate rates." This Court affirmed the order of the District Court remanding the case to the Interstate Commerce Commission for further consideration on the grounds that the Interstate Commerce Commission failed to make findings as to the total of

indirect costs and taxes to which contribution was to be made by the commuter fares and also as to the revenue contributions made by the other intrastate services.

In the instant case the Interstate Commerce Commission failed to make findings as to the total railway operating income of the railroad appellees to which contribution is to be made by the Minnesota intrastate rates on bituminous coal and also as to the revenue contributions made by the other intrastate services. The appellants contend that the *Milwaukee case* is controlling herein and that, therefore, the order of the Interstate Commerce Commission increasing Minnesota intrastate rates on bituminous coal should be annulled and set aside since in the instant case the Interstate Commerce Commission failed to make the findings required in the *Milwaukee case*. The government appellees and the railroad appellees, however, contend that that *Milwaukee case* is distinguishable from the case at bar (Govt. pp. 11-12; Rys. pp. 9-11).

First, the government and railroad appellees argue that the *Milwaukee case* did not have as its genesis a nation-wide general revenue increase case such as *Ex Parte 175* which is the basis for the instant case and that, therefore, the decision in the *Milwaukee case* is not applicable in the instant case (Govt. p. 11; Rys. p. 9). Analysis reveals that there is no merit to this argument. In the *Milwaukee case* this Court discussed the powers conferred upon the Interstate Commerce Commission under Section 13(4) of the Interstate Commerce Act and stated as follows:

> "The occasion for the exercise of the federal power asserted by §13(4) is the necessity for effecting the required contribution by intrastate traffic of its proportionate share of the revenues necessary to pay a carrier's operating cost and to yield a fair return. When intrastate revenues fall short of producing their fair proportionate share of required total revenues, they work an

undue discrimination against interstate commerce, and the ICC may remove the discrimination by fixing intrastate rates high enough reasonably to protect interstate commerce. *Illinois Commerce Comm'n v. United States*, 292 U.S. 474, 479; *Wisconsin R. Comm'n v. Chicago, B. & Q. R. Co.*, 257 U.S. 563, 586; *United States v. Louisiana*, 290 U.S. 70, 75. In determining whether an undue revenue discrimination against interstate commerce is caused by intrastate rates, the ICC may consider, 'among other things, the need, in the public interest, of adequate and efficient railway transportation service and the need of revenues sufficient to sustain such service,' a standard written into 49 U.S.C. §15a(2). *King v. United States*, 344 U.S. 254, 264. No formal requirements are prescribed for the findings to be made by the ICC under §13(4). *United States v. Louisiana*, 290 U.S. 70, 80. Reasonable determinations suffice. *Florida v. United States*, 292 U.S. 1, 9. But the justification for the exercise of this exceptional federal power to interfere with intrastate rates must be made definitely and clearly apparent. *Florida v. United States*, 282 U.S. 194, 212."

All of the cases above cited and relied upon by this Court in the *Milwaukee case* pertain to cases which involved general revenue proceedings. Thus, this Court in the *Milwaukee case* did not distinguish between Section 13(4) cases which had as their genesis a nation-wide general revenue case and those which did not involve such general revenue cases as *Ex Parte 175*.

Furthermore, this Court in its decision distinguished the *King case*, relied upon herein by the government and railroad appellees, from the *Milwaukee case*. This Court did not distinguish the two cases on the basis argued for by the appellees but on the basis that in the *King case* the Interstate Commerce Commission viewed the entire Florida intrastate operation, freight and passenger, and made a finding that the entire intrastate operation constituted a revenue drain upon the revenues derived by the railroads from interstate

traffic but in the *Milwaukee case* the Interstate Commerce Commission failed to find whether or not the commuter fares constituted a revenue drain upon the carriers' interstate revenues in view of the entire intrastate operation as a whole. Thus, it is clear that this Court in the *Milwaukee case* did not distinguish between Section 13 cases based on general revenue proceedings and such cases not based on general revenue proceedings in determining the principal findings which are necessary to support an order of the Interstate Commerce Commission increasing intrastate rates pursuant to the authority conferred upon it under Section 13(4) of the Interstate Commerce Act.

The railroad appellees also argue that the instant case is distinguishable from the *Milwaukee case* because in the instant case the Interstate Commerce Commission relied upon *Ex Parte 175*, a nation-wide general revenue case, wherein the Interstate Commerce Commission had taken into account the total revenue needs of the railroads from both interstate and intrastate operations and that in the *Milwaukee case* the Interstate Commerce Commission was not relying upon such a general revenue case (Ry. p. 10). The case law does not support this theory of the railroad appellees. In *Mississippi Public Service Com'n v. United States*, 124 F. Supp. 809, 815 (S.D. Miss. 1954) (affirmed 349 U.S. 908), the Court stated as follows:

> "The record shows that in making the investigation for the nation as a whole in Ex Parte No. 175 that the Commission at that time was making a determination that the intrastate rates should be increased as well as the interstate rates. That will not do. *There must be a finding based upon substantial evidence after full investigation* that the intrastate rates are abnormally low and that the traffic thereunder fails to produce its fair share of the earnings to yield revenue sufficient to accomplish the purpose of interstate commerce. The record does not bear out any substantial evidence to this

> effect. There was no separation made by the railroads of their revenues, expenses and properties as between interstate and intrastate operations. So far as the record shows, it could be fairly assumed that the rates fixed by the Mississippi Commission were not abnormally low but were bearing a fair percentage of revenue for the operation of the carriers." (Emphasis added.)

If the Interstate Commerce Commission could determine in a nation-wide general revenue proceeding that all intrastate rates should be increased to the same extent as interstate rates, there would be no need for Section 13(4) proceedings as provided for by Congress. This argument of the railroad appellees is contrary to the language of Section 13(4) of the Interstate Commerce Act which provides for a full hearing in order to determine whether or not the intrastate rates in question cause undue discrimination against interstate commerce. *Mississippi Public Service Com'n v. United States, supra.*

The railroad appellees further contend that in the instant case the Interstate Commerce Commission had determined the justness and reasonableness *of the increases* on each and every commodity and that in the *Milwaukee case* the Interstate Commerce Commission had not made such a determination. Findings as to the justness and reasonableness *of the increases* on commodities are irrelevant. When intrastate rates are attacked on the basis that they cause undue, unreasonable or unjust discrimination against interstate commerce, the Interstate Commerce Commission must make findings that the interstate rates themselves, not the increases, are reasonable. *Georgia Public Service Comn. v. United States*, 283 U.S. 765, 770. Although general increases are found to be reasonable, particular increased rates are not thereby found to be just and reasonable. *Coal from Illinois to Alton and East St. Louis*, 274 I.C.C. 637, 669. Thus, in the instant case and the *Milwaukee case*, both Section 13(4)

proceedings, there must be findings that the interstate rates in question are just and reasonable and the fact that the Interstate Commerce Commission in the instant case had previously found in *Ex Parte 175* that the general increases on interstate rates were just and reasonable is not a relevant factor distinguishing the two cases for purpose of determining whether or not the findings were sufficient to uphold the order of the Interstate Commerce Commission.

The railroad appellees further argue that the instant case and the *Milwaukee case* are distinguishable because in the instant case the Interstate Commerce Commission found that the increased intrastate freight rates and charges will contribute "not more than a just proportion of the respondents total railway operating income" and in the *Milwaukee case* the Interstate Commerce Commission found that the increased commuter rates will "make a fair contribution toward respondent's indirect costs and return on investment." This Court in the *Milwaukee case* did not affirm the decision of the District Court remanding the case to the Interstate Commerce Commission for further consideration on the basis that the finding as to contribution by the intrastate commuter fares was not couched in the same language as used in finding 6 in the *King case*—"* * * will constitute not more than a fair proportion of respondents' total income," which finding is similar to finding 5 in the instant case. In the *Milwaukee case* this Court, in footnote 8 in regard to the finding as to contribution, stated as follows:

> "[8]We agree with the District Court that that portion of the prescribed increases designed to produce $77,000 annually as a contribution to indirect costs and taxes is not based upon adequate findings. There is no finding of the total of indirect costs and taxes to which contribution is to be made, nor any finding from which we may infer how the ICC derived its conclusion that a $77,000 contribution was fair. It is axiomatic that to

> know whether something is a fair proportionate part of something else, we must be told what the something else is."

Whether the contribution finding is stated in terms of indirect costs and return on investment or in terms of operating income, the criticism of this Court in the *Milwaukee case* is applicable as to findings in a Section 13(4) proceeding. In the instant case, there is no finding as to the total amount of revenues required by the railroad appellees to operate efficiently, nor as to the total to be contributed by intrastate rates and charges as a whole, and, therefore, it is impossible to ascertain whether or not the revenues allegedly to be derived from the increased intrastate rates on bituminous coal will contribute not more than a just proportion of the railroads' total operating income. The principle enunciated in the *Milwaukee case* is equally applicable here—"to know whether something is a fair proportionate part of something else, we must be told what that something else is."

In regard to the finding that this Court found to be necessary in the *Milwaukee case*—whether or not the intrastate rates, viewed in the light of the entire intrastate operation, constitute an undue, unreasonable or unjust revenue discrimination against interstate commerce, the government appellees argue that if the Interstate Commerce Commission is required to segregate interstate and intrastate revenues and expenses in Section 13(4) proceedings, the proceedings would be greatly delayed (Govt. pp. 5-6). The government appellees completely overlook the unfortunate position of intrastate shippers if such revenue findings are not required in such cases as in the instant case where intrastate shippers of only one commodity challenge the validity of an order of the Interstate Commerce Commission increasing intrastate freight rates. The adoption of the government appellees' argument would be equivalent to holding that

once the Interstate Commerce Commission authorizes a general revenue increase on interstate rates, ipso facto the same increase should be applied on all intrastate rates. But this Court has held that a mere disparity between interstate and intrastate rates is not sufficient basis for the exercise of the Interstate Commerce Commission's power to alter intrastate rates. *State of North Carolina v. United States,* 325 U.S. 507 (1945). The very nature of general revenue proceedings requires that the Interstate Commerce Commission must provide a savings clause in its order for the modification and adjustment of particular rates. *Georgia Public Service Commission v. United States,* 283 U.S. 765, 772; *United States v. Louisiana,* 290 U.S. 70, 76. In approving general rate increases, the Interstate Commerce Commission merely finds that the general increases are reasonable but does not find that the particular increased rates are just and reasonable. *Coal from Illinois to Alton and East St. Louis,* 274 I.C.C. 637, 669. If interstate rates as increased in a general revenue case are not necessarily just and reasonable rates, it would certainly be unfair and unjust to intrastate shippers to hold that intrastate rates without the general increase are unduly low and cause undue, unreasonable or unjust discrimination against interstate commerce without further evidence showing that the intrastate rates in question are unduly low and are not contributing their fair share to the railways' operating income when viewed in the light of the entire intrastate operation. The occasion for the exercise of the power of the Interstate Commerce Commission under Section 13(4) is not to invoke uniformity of interstate and intrastate rates but to effectuate a fair proportionate share by intrastate traffic to the railways' total operating income. *Chicago, M. St. P. & P. R. Co. v. Illinois,* supra, p. 305. The convenience or inconvenience to the Interstate Commerce Commission is certainly not a proper factor to consider in determining

whether or not the intrastate rates cause undue discrimination against interstate commerce; the justification for the exercise of its power must "clearly appear." *Florida v. United States,* 282 U.S. 194, 212. Furthermore, the *King case* is not authority for the position of the government appellees since in that case this Court found that the Commission did not rely merely upon a disparity between interstate and intrastate rates and the sufficiency of the evidence to support the findings was not questioned. *King v. United States, supra,* 73 S.Ct. 259, 269-270.

2. Inadequacy of Interstate Commerce Commission Findings with Respect to the Interstate Rates on Bituminous Coal.

The government appellees argue that a finding that amounts and percentages by which interstate rates were authorized to be increased in *Ex Parte 175* are just and reasonable is equivalent to a finding that the increased interstate rates on bituminous coal are just and reasonable since the Interstate Commerce Commission in *Ex Parte 175* "authorized a specified maximum increase in these rates" (Govt. p. 7). The government appellees fail to cite any authority for their above argument.

The appellants respectfully contend that a finding as to the reasonableness of a general increase in interstate rates is not equivalent to a finding that the interstate rates on bituminous coal as increased are just and reasonable. In the case of *Coal from Illinois to Alton and East St. Louis,* 274 I.C.C. 637, 669, the Interstate Commerce Commission held:

> "Coming now to consideration of the reasonableness of the rates before us: Before entering a 13th Section order requiring state rates to be increased to the level of interstate rates, *we must first determine that the interstate rates are just and reasonable* and that the

intrastate rates, when so increased, will be just and reasonable." (Emphasis added.)

and at page 670 of the same decision:

"Respondents' assumption, that the reasonableness of the present interstate rates is not open to question because rates found reasonable 20 years ago have taken only the general rate increases, is without fundation. In approving both of the general rate increases relied upon, we said that the rates increased as permitted are not considered as prescribed rates, within the meaning of *Arizona Grocery Company v. A. T. & S. F. Ry. Co.*, 284 U.S. 370. The effect of that statement is equivalent to saying that while general increases were found reasonable, *such general approval does not have the effect of approving any particular increased rate as not being in excess of a maximum reasonable rate.*" (Emphasis added.)

It should also be noted that in *Jacksonville Chamber of Commerce v. A. & W. P.*, 211 I.C.C. 509, 513, the Interstate Commerce Commission held:

"Complainants argue that the interstate rates considered may be deemed to be just and reasonable for the purpose of using those rates in the removal of any undue prejudice found to exist unless there is proof in this record that the interstate rates are unreasonable. We cannot agree with this contention. When we act affirmatively to fix the rate, or the maximum or minimum rate provided by this section of the Act, we must be governed by the requirement of Section 1 of this Act that such rates be reasonable. *Reasonableness of a rate is a question of fact which is susceptible of proof and we cannot assume the fact of reasonableness on the basis of absence of proof to the contrary.*"

"In a case of this character, Section 13(4), it is therefore *a part of complainant's case to offer sufficient evidence to establish the reasonableness of the rates which are to be maintained* * * *." (Emphasis added.)

From the above cases, it is apparent that a finding that general increases are reasonable is not the same as the re-

quired finding in Section 13(4) cases that the increased interstate rate on a particular commodity is just and reasonable. Since there was no finding in the instant case that the increased interstate rates on bituminous coal are just and reasonable, the order of the Interstate Commerce Commission increasing the intrastate rates on bituminous coal should be annulled and set aside on that ground alone. (Jurisdictional Statement pp. 20-21.)

3. Insufficiency of Evidence to Support the Findings.

At this juncture appellants wish to stress another fundamental distinction between the instant case and *King v. United States*. In the latter, this Court, at page 272, stated:

> "No question has been raised here as to the adequacy of the evidence upon which any of the findings are based."

In this case, in addition to attacking the adequacy of the findings, appellants submit that the findings discussed below which were made were not supported by substantial evidence of record.

The government appellees erroneously contend that the appellants do not challenge the sufficiency of the evidence in regard to the finding that the increased intrastate rates on bituminous coal "will provide not more than a just proportion of the respondents' total railway operating income" (Govt. pp. 12-13). In their jurisdictional statement, the appellants did contend that the Interstate Commerce Commission failed to make the necessary findings showing (1) the total amount of revenues required by the railroad appellees to render adequate and efficient railway transportation service, (2) the amount to be contributed by the increased intrastate freight rates on bituminous coal, and (3) the amount contributed by Minnesota intrastate traffic which would constitute a fair proportion of the railroads' total operating income (pp. 13-18). The appellants further con-

tend that the railroad appellees failed to introduce evidence showing (1) the system operating revenues and expenses for all the railroad appellees—either individually or as a group—and (2) the Minnesota intrastate operating revenues and expenses for all railroad appellees—either individually or as a group (Jurisdictional Statement p. 18). The appellants also have demonstrated that the evidence showed that the then existing intrastate freight rates were not abnormally low but were contributing their fair share to the railroads' total revenue (Jurisdictional Statement p. 26). Obviously, the appellants challenged the sufficiency of the evidence not only to support the revenue findings that are absent in the instant case but also to support the ultimate finding of the Interstate Commerce Commission that the increased intrastate freight rates on bituminous coal will provide not more than a just proportion of the total railway operating income.

The government appellees contend that the evidence of record supports the finding that "the transportation conditions incident to the intrastate operation of freight in Minnesota are not more favorable than those between Minnesota and interstate points" because the evidence shows that there is no difference from an operating standpoint between the two classes of traffic, that interstate and intrastate shipments were intermingled on the same trains, and that a greater percentage of intrastate shipments moved on local trains than on through trains (Govt. p. 13). The pertinent point here is that the government appellees fail to discuss whether or not there is evidence of record showing a similarity of interstate and intrastate transportation conditions *applicable to bituminous coal.*

The appellants again respectfully contend that there is no evidence of record showing that the transportation conditions under which bituminous coal moves in interstate and

intrastate traffic are substantially identical with respect to all factors bearing upon the reasonableness of rates. The government appellees rely on exhibits 13 and 14 for their position on this issue; however, a railroad witness testified that he did not know of any shipments of bituminous coal from the upper lake commercial docks during the test period covered by these two exhibits (Tr. 343). Furthermore, there is strong evidence of record that the conditions incident to motor carrier transportation of bituminous coal from the Duluth docks to Minnesota intrastate points are extremely favorable because of the all-weather highways available and the relatively short distances involved (Tr. 533-34; 654). There is no evidence that the same adaptability for movement of bituminous coal by truck applied to interstate shipments of bituminous coal. The existence of truck competition in intrastate traffic is an important factor to consider in determining whether or not the transportation conditions of interstate and intrastate traffic are similar. *Intrastate Rates on Bituminous Coal*, 188 I.C.C. 342, 348; *Standard Paper Mfg. Co., Inc. v. Alabama G. S. R. Co.*, 196 I.C.C. 569, 575. In *Jacksonville Chamber of Commerce v. A. & W. P. R. Co.*, 211 I.C.C. 509, 511, the Interstate Commerce Commission stated as follows:

> "* * * Since truck operations have become a real factor in the transportation field, we have consistently regarded rail transportation, where truck competition is encountered, to be performed under circumstances and conditions which are dissimilar to those instances in which truck competition does not exist at all or to the same extent. *Rate Structure Investigation*, Part 3, *Cotton*, 174 I.C.C. 9, 176 I.C.C. 249."

When viewed in the light of the entire record, the evidence is not sufficient to warrant a finding that the transportation conditions for bituminous coal are identical in both interstate and intrastate traffic. It is irrelevant what the trans-

portation conditions may be for other commodities in interstate and intrastate commerce.

The government appellees contend that the District Court properly stated that the Interstate Commerce Commission was in a "far better position than the Court to appraise and weigh the diverse opinions of witnesses for the railroads, the shippers, and the consumers" in regard to the finding that the railroads' revenues would be substantially increased as a result of the increased intrastate rates on bituminous coal (Govt. p. 14). The appellants, however, claim that the testimony of the railroad witnesses is so extremely weak as not to be substantial evidence, their opinions being based upon the assumption that the same volume of traffic as before would move on the increased intrastate freight rates for bituminous coal (Ex. 12); that the Minnesota Railroad and Warehouse Commission—which found that intrastate freight rates on bituminous coal, if increased, would accelerate conversion to other fuels and diversion to other modes of transportation—was in a better position to evaluate the effect of the proposed increase (Jurisdictional Statement, pp. 66, 71), and that several executives of coal dock companies, who are in a position to control the shipment of large quantities of bituminous coal in Minnesota intrastate traffic, testified contrary to the finding and their testimony should be given considerable weight. The evidence to support this finding is not sufficient when viewed in the light of the prevailing rule of law. *Mississippi Public Service Com'n v. United States, supra,* p. 816.

With reference to the sufficiency of evidence to support the finding that the intrastate freight rates on bituminous coal are unduly low, the government appellees state that the history of Minnesota intrastate bituminous coal rates and the interstate freight rates on bituminous coal are sufficient evidence to support the finding (Govt. pp. 14-15). The govern-

ment appellees do not attempt to demonstrate the relevancy of the history of the Minnesota intrastate freight rates on bituminous coal in determining the reasonableness of such rates; and it is indeed doubtful in what way such history would be relevant in determining this issue. As to a comparison of the interstate and intrastate freight rates on bituminous coal, this Court has stated on numerous occasions that a mere disparity between interstate and intrastate rates is not a sufficient basis for a finding that the intrastate rates are abnormally low. *State of North Carolina v. United States,* 325 U.S. 507, 516; *Florida v. United States,* 282 U.S. 194, 211-212; *Mississippi Public Service Com'n v. United States,* 124 F. Supp. 809, 814. Obviously, in view of the evidence submitted by the appellants showing the high level of earnings by the railroads from the then existing intrastate freight rates on bituminous coal, there is no evidence in the record to support this finding that the intrastate rates on bituminous coal are abnormally low; in fact, the evidence is to the contrary. (Jurisdictional Statement, pp. 25-26.)

4. Prejudicial Errors of the Interstate Commerce Commission as to Admissibility of Evidence and Scope of Cross Examination.

In regard to appellants' contention that the examiner received exhibits without proper foundation and unlawfully prohibited appellants' cross examination, acts which were prejudicial to the appellants, the government and railroad appellees merely refer to the statement of the District Court in its decision (Govt. p. 15, Rys. p. 12). The appellants again respectfully contend that the erroneous rulings of the examiner were highly prejudicial to the appellants and constituted a denial of a fair hearing to the appellants in flagrant violation of Section 7(c) of the Administrative Procedure Act, 5 *U.S.C.* 1006(c) (Jurisdictional Statement, pp. 27-30).

For example, Exhibit 14 was made pursuant to the following direction:

> "In connection with this study *we must show* that the cost of handling intrastate traffic in local trains exceeds the cost of handling similar traffic in through trains. This will be possible even though the volume of intrastate traffic may be exceeded by the volume of interstate traffic in the local trains because the wage costs are divided among the lesser number of cars that are usually handled in local trains." (Exhibit 31, p. 4.) (Emphasis supplied.)

In connection with the wage data supplied for Exhibit 14, the following instruction was given:

> *"Include only such special allowance payments for which under schedule rules is a part of a road trip. Do not include under any circumstances vacation-pay, deadhead miles, held-away-from-home terminal pay, or time slips for work not performed (such as run-arounds)."* (Exhibit 31, p. 5.)

The obvious reason for eliminating the above payments was to keep the wage costs for through freight trains lower than for local freight trains since the railroad appellees argued that a greater percentage of intrastate traffic moved on local trains and, therefore, the wage costs for intrastate traffic was greater than for interstate traffic. Since data unfavorable to the railroad appellees' predetermined conclusion was eliminated from the wage cost study, Exhibit 14, it was important to the appellants to have an opportunity to cross-examine the witnesses of the railroad appellees in regard to the instructions which they received for the preparation of this exhibit and as to the costs incurred for the payment of the special allowances which were eliminated from the study.

If proper cross examination had been permitted, appellants contend that they would have shown (1) that wages paid crewmen and trainmen on both local and through freight

trains are computed on either eight-hour day or 100-mile basis, whichever is reached first; (2) that crewmen and trainmen on through trains generally complete their services for 100 miles in less than eight hours; (3) that crewmen and trainmen on through trains generally worked less hours for the wages received than crewmen and trainmen on local trains; (4) that in Exhibit 14 wages were not computed on the basis of hours actually worked but on an arbitrary basis of eight hours for crewmen and trainmen on both local and through trains; (5) that if in Exhibit 14 the hourly rate of wages paid crewmen and trainmen on local and through trains had been computed on the basis of hours actually worked, the average cost of wages per hour for crewmen and trainmen on through trains would have been greater than the average cost of wages per hour for employees on local trains; and (6) that since a larger percentage of interstate traffic moved in through trains rather than in local trains, the average cost of wages for interstate traffic would have been shown to be greater than the average cost of wages for intrastate traffic on the basis of the rate of pay received by employees for the hours actually worked.

Thus, being allowed proper cross examination, appellants would have shown that Exhibit 14 was not an accurate and fair comparison of wages paid crews on through and local freight trains and that the conclusion argued for by the railroad appellees from Exhibit 14, and adopted by the Interstate Commerce Commission, was erroneous.

5. Savings Clause Is Insufficient to Prevent Deprivation of Property Without Due Process of Law.

Neither the government appellees or the railroad appellees in their Motions to Affirm discussed the following question:

> "7. Whether the savings clause in the Report, Findings and Order of the Interstate Commerce Commission is sufficient to prevent the deprivation of appellants' property without due process of law as guaranteed under the Constitution of the United States since the appellants are limited therein to apply for modification of the increased intrastate freight rates and charges on bituminous coal on the sole ground that such rates and charges are not related to the interstate rates and charges on like traffic in such a way as to contravene the provisions of the Interstate Commerce Act, thereby denying the appellants the right to obtain reparations if the increased intrastate rates and charges on bituminous coal are found to be unjust and unreasonable or otherwise unlawful—which right is protected in the general revenue proceeding involving interstate rates and charges which is the basis of this action."

The appellants therefore respectfully refer this Court to its previous discussion of this question (Jurisdictional Statement, pp. 30-32) and request this Court to note probable jurisdiction in the instant case and determine the effect of a savings clause in an Order of the Interstate Commerce Commission in a Section 13(4) proceeding as to the property rights of intrastate shippers affected by such order.

CONCLUSION

Appellants' Jurisdictional Statement has set forth the substantial questions involved in this appeal, which questions affect the determination of rights of shippers, state commissions and the general public who are all greatly affected by the increasing number of general revenue cases brought by the rail carriers before the Interstate Commerce Commission and also by the increasing number of Section 13 cases as outgrowths of the general revenue proceedings. In the instant case the Interstate Commerce Commission increased intrastate rates for bituminous coal on the sole basis that the intrastate rates do not bear the same increase as authorized by it for interstate rates and usurped the primary power of the state to regulate its intrastate rates since neither the findings nor the evidence are sufficient to uphold the order of the Interstate Commerce Commission.

Appellants have further shown in their Jurisdictional Statement the manner in which this proceeding was conducted, accepting in evidence voluminous, statistical exhibits without proper foundation and curtailing cross examination of witnesses who vouch for the accuracy of such statistical exhibits. Such erroneous rulings are highly prejudicial to the protesting shippers who thereby were deprived of the opportunity to ascertain the relevancy and accuracy of such statistical exhibits. Appellants have also shown that there is grave doubt as to what protection the shippers are given by the savings clause in this order increasing intrastate rates in a Section 13(4) proceeding so as to prevent the deprivation of property without due process of law.

The questions submitted to this Court are of great public importance and are so substantial as to require plenary consideration, with briefs on the merits and oral argument. Appellants request that the motions of the appellees to

affirm be denied and that this Court note probable jurisdiction.

Respectfully submitted,

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